

**Presumed Guilty:
Shareholder Liability
for a Subsidiary's
Infringements of
Article 81 EC Treaty**

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Presumed Guilty: Shareholder Liability for a Subsidiary's Infringements of Article 81 EC Treaty*

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1. Introduction

There is a shadowy area in the European law of shareholder liability for competition infringements by a present or former subsidiary, and it is getting darker. European, Asian, and North American companies are probably largely unaware of the reality that when they buy the shares of a company, they could be buying substantial joint and several liabilities arising out of the ongoing or past involvement of the subsidiary in a cartel with a European dimension. Shareholders do not necessarily shed that liability when they sell the shares and their liability bears little or no relationship to any independently improper conduct on the shareholder's part; instead, the shareholder's liability is for most practical purposes "automatic".

Just as we do not punish parents for the sins of their children, so it is that most national legal systems do not routinely impose liability on a shareholder for the conduct of the company whose shares are held. The European Commission ('Commission') – the European antitrust body with jurisdiction to apply Article 81 EC Treaty -- pays very considerable lip service to this principle but it is in practice largely ignored; indeed the principle is passively rejected by the Commission at the same time that it is seemingly actively embraced. Instead, the Commission, supported by the Court of First Instance ('CFI') and more recently the European Court of Justice ('ECJ'), "presumes" that a one hundred percent (or even majority) shareholder is able to, and does, exercise "decisive influence" over the commercial policies of its subsidiary, including the

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infringing activities of a subsidiary involved in a cartel. The Commission then relies on this “presumption” to impose joint and several liability upon both the subsidiary/actor and its parent corporation.

There would be nothing wrong with the Commission’s “presumption” of shareholder liability if the Commission would articulate and apply in some understandable and more or less predictable way a standard by which the presumption could be overcome or rebutted. However, the Commission virtually never finds the presumption to be rebutted even though the ECJ has held, in otherwise supporting the Commission, that “*the imputation to the parent company of its subsidiary’s conduct is always dependent on the findings that management power was actually exercised...*”² The ECJ went on to say in the same opinion that “*a 100 hundred per cent shareholding in the capital of the subsidiary cannot, in itself, be sufficient to prove the existence of such control by the parent company.*”³

Surprisingly, too, if the Commission were to find some generalized control by a parent corporation over its subsidiary, such as, for example, through the appointment of directors, it sees no need to show some connection between the control exercised and the subsidiary’s infringing participation in a cartel. Instead, the Commission relies on the mere existence of the *ability* of the parent to exert ‘decisive influence’ over the commercial policy of the subsidiary, rather than any actual exercise of such control, and irrespective of whether the decisive influence over commercial policy would or could extend to the injurious behavior that is the subject of the Article 81 EC proceedings. In essence, the Commission, facilitated by the CFI and the ECJ, is taking the law of vicarious liability in a direction that is animated both by bad law and worse policy, and it is doing so with a certain intentional disregard for shareholder rights or interests.

The Commission seems to say one thing, yet do something else altogether. The Commission says that the presumption of shareholder liability can be rebutted, but almost never finds that it has been, and no decision has ever articulated clearly what burden must be carried by a shareholder to rebut the presumption. Further, the current European Commissioner for Competition regularly expresses the view that decisions holding shareholder liable are “sending a message” to or otherwise warning shareholders and directors. Indeed, it has effectively become the intentional policy of the Commission to impose “no fault” liability upon corporate shareholders for their status as majority shareholders. They are found liable not for any sort of over-involvement in the affairs of, or misuse of, the subsidiary, but instead for some sort of failure to prevent the infringement by the subsidiary. Put another way, shareholders are found liable for under-involvement in the affairs of the subsidiary.

Although the administrative procedure by which the Commission investigates cartels and imposes fines is not criminal in nature⁴, undeniably the fines have a strong punitive or

² Case C-286/98 P, *Stora Kopparbergs Bergslags AB v Commission*, [2000] ECR.I-9925, para 23.

³ *id.*

⁴ Article 23(5), Council Regulation (EC) No. 1/2003.

disciplinary element to them.⁵ Most, if not all, developed legal systems shy away from imposing vicarious liability for the criminal acts of another.

Yet the current test of ‘decisive influence’ no longer functions as a rebuttable presumption, and in effect operates as a strict liability test for the deeds and acts of majority or wholly-owned subsidiary companies. The law has become not what the Commission’s words say, but rather what the Commission does, and what the Commission does is impose liability upon shareholders nearly all the time without regard to their actual involvement in unlawful conduct and without regard to whether the subsidiary itself is fully capable of honoring any fine imposed. This is altogether different from the corporate law of nearly all the member states⁶ and of most of the

⁵ For example, see *Commission 21st Report on Competition Policy* [1991], para 139; see also Cases 100-103/80 *Musique Diffusion Française v Commission* [1983] ECR II-1825, at para 105.

⁶ In **Germany**, a company is recognized as a separate legal entity for whose debts its shareholders are, in principle, not liable. Therefore, shareholders generally cannot be held responsible for the acts or omissions of the company, the latter being only liable to third parties in the amount of its assets. Nevertheless, a company’s shareholders may be involuntarily held liable for its debts under the following circumstances:

- **statutory liability:** liability on shareholders imposed through means of legislation (such as, for instance, tax law, environmental law, etc);
- **ignoring the legal personality:** shareholders have a direct obligation not to seriously endanger the capacity of their subsidiary to fulfill its obligations and in case such obligation is breached, the shareholders cannot invoke the limited liability under said provision;
- **tort:** shareholders may be held liable under §826 BGB, which provides that a person who deliberately causes damage to another person, which is in violation with good morals, is obliged to pay damages to such person.

Therefore, the single fact that a shareholder provides a contribution to the policy and management of the subsidiary, or acts as the actual executive as if it were director of the subsidiary, does not suffice to establish liability of that shareholder based on tort. The same applies when the parent company interferes with the operational management of the subsidiary, which does not automatically result in liability on the part of the parent company without personal culpability of the parent company or one of the parent company’s directors (Daniella A.M.H.W. Strik, in “Shareholders’ liability in the UK, Germany and the Netherlands: is strict liability of shareholders reducing the effect of the corporate veil?”).

In the **UK**, the principle of the separate legal entity cannot be found in legislation in the UK. However, its expression has been confirmed in case law. In *Salomon v A. Salomon & Co Ltd.*, [1897] AC 22, the principle of limited liability was held to shield shareholders from claims made against the company in which they hold shares. Such principle has also been confirmed in *Adams v Cape Industries*, [1990] Ch 433. Nevertheless, a company’s shareholders may be involuntarily held liable for its debts under the following circumstances:

(i) **statutory liability:** *Section 213* (UK Insolvency Act 1986) (fraudulent trading). Any persons who were knowingly parties to the carrying on of any business of the company or creditors of any other person, or for any fraudulent purpose, may be found liable by a court to make such contributions (if any) to the company’s assets as the court thinks proper. Therefore, to fall under *Section 213* implies that simply being the sole shareholder of a company does not meet the criteria given, but positive steps must be taken. In addition, *Section 214 (id)* (wrongful trading) attaches liability to directors that did not take proper steps to minimize the potential losses of a failed company.

(ii) **tort:** in the UK, shareholders and subsidiaries have been held liable as joint tortfeasors in cases where both the parent and its subsidiary owed a relevant duty of care or other obligation to a third party and were both responsible for a consequent loss suffered by a third party as a result of the breach of the relevant duty or the failure to perform an obligation. In this regard, for a parent to be held liable, it would seem that there needs to be a specific

non-EU states⁷ around the world. In nearly all countries, shareholder liability for the acts of a subsidiary is tied in some way to the improper control or domination of a subsidiary by a

instruction from a parent to subsidiary, instructing it to breach a contract with a third party. Alternatively, there needs to be requisite unlawfulness by the parent introducing the subsidiary to breach its contract with a third party.

In **Italy**, shareholders are not as a rule personally responsible for the obligations of the company itself. However, shareholders exercising management/coordination activities over the subsidiary may be directly liable vis-à-vis the company (in particular the minority shareholders) and the creditors for the acts or omissions which are in breach of the principles of correct corporate management. There is an exception for direct liability of the shareholders, which may only exist in case of default in the payment of the contributions due for the subscription of their shares.

The reform of the Italian commercial law (Legislative decree n. 6 of 17.01.2003) for the first time introduced an organic discipline of the groups of companies, in articles 2497 -2497. The reform introduces in the code, the “*theory of the compensative advantages*”, which was elaborated by the jurisprudences during the 90s. It provides that, even if a directive of the parent company causes damage to the subsidiary, the former cannot be held responsible or ordered to pay damages to the latter if it can be proven by the management of the parent company that the subsidiary profited from compensating advantages deriving from the belonging to the group.

However, there are no provisions as regards the damages caused by the subsidiary to third parties. To this regard, there is a contrast (both in doctrine and in jurisprudence) between the principle of autonomy (legal personality) of each company of the group and the principle of unity of the group (common interest). In fact, the formal independence and distinct legal personality would prevent creditors from asking the parent company for damages caused by its subsidiary, even if in the implementation of the group’s directives. On the contrary, by taking in greater consideration the fact that the subsidiary’s management has to apply the parents’ directives, often without any autonomy or possibility to depart from it, at least an extra-contractual liability could be envisaged on the parent company’s side, for damages to: (i) creditors’ expectation to receive refund of the credit and (ii) integrity of the shareholding of third shareholders in the subsidiary. Given the lack of a clear position on the issue in the legislation, the matter should still be resolved by reference to case-law.

In **Brazil**, the legal principle in place preaches for the separation between the social heritage (company assets) and the shareholders’ heritage (shareholders’ assets). In case the company’s assets are insufficient to comply with its social obligations, the shareholders will be liable exclusively for the amount of the debit correspondent to the capital-stock not paid-in. In case all capital stock has been paid in by the shareholders, they would not, in principle, bear liability. Nevertheless, there are specific cases which establish exceptions to the general rule:

- **abuse of rights**: exercise of licit act(s) but which do not comply with the social end of the acts.
- **fraud**: exercise of licit act(s) resulting in a illicit end;
- **infringements to law or statutes**: for instance, fiscal requirements on the liquidation of the company.

Based on the abuse of rights or fraud committed by the company it may have its legal personality annulled, what would imply in the possibility of holding shareholders personally liable for the obligations of their company or subsidiary.

⁷ The main non-EU trading partners who have developed pertinent law are the Unites States, Japan and Korea.

In the **United States**, the question of whether the corporate veil may be pierced typically will be controlled by the laws of one of the states, although there also is a fairly well-developed body of federal veil-piercing law that has been applied to, among others, federal antitrust and other federal competition law issues. One of the most widely employed tests, the so-called “instrumentality test,” which has been applied in both contract and tort cases and was formulated by the New York Appellate Division many years ago, obligates a party seeking to pierce the corporate veil to satisfy a rigorous three-pronged test. See *Lowendahl v. Baltimore & Ohio RR Co.*, 247 A.D. 144, 287 N.Y.S. 62, 74 (1st Dept.), *aff’d*, 272 N.Y. 360, 6 N.E. 56 (1936). This test requires proof of

(1) [c]ontrol, not mere majority or complete stock control, but complete domination, not only of finances,

but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) [s]uch control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

"(3) [t]he aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

See id. Courts applying this test generally hold that a shareholder cannot be held liable of obligations of its corporation unless the shareholder exercised complete domination and control with respect to the complained of a conduct and engaged in some wrongful conduct that is causally related to the claimed injury. *See, e.g., American Protein Corp. v. AB Volvo*, 844 F.2d 56 (2d Cir. 1988) (shareholder could not be held liable for subsidiary's breach of contract where the parent did not exercise complete domination and control over the subsidiary with respect to the contract for dried blood at issue); *Davis v. Connecticut General Life Ins. Co.*, 743 F. Supp. 1282, 1284 (M.D. Tenn. 1990) (shareholder could not be held liable for subsidiary's alleged employment discrimination because there was no evidence that the shareholder directed the plaintiff's alleged discriminatory discharge from her job); *Realco Services, Inc. v. Holt*, 513 F. Supp. 435, 440 (E.D. Pa. 1980) (corporate veil could not be pierced because, notwithstanding the shareholder's "total control over financing of [the subsidiary's] operations," plaintiffs "have not shown that [the shareholder], or any of the [shareholder's other] enterprises 'exercised such control over policy, or business practice in respect to the **transaction** attacked' that [the subsidiary] had 'no separate mind, will or existence of its own'").

In **Japan**, the doctrine of piercing the corporate veil to impose liability on shareholders - or "disregard of the corporate entity" as it is known in Japan - was first recognized by the Japanese Supreme Court in 1969. *See Corporations & Partnerships: Japan*, Int'l Encyclopedia of Laws v.3, at 91-92 (Nov. 2001) (citing Saihan, 27 February 1969, 23 Minshu 511). According to the Court, to apply the principle of disregard of the corporate entity, there must be (1) the existence of a corporate entity being abused for the purpose of avoiding the application of the law, and (2) the corporate entity is "merely a name." Id.

Under the first factor, there must an entity or individual controlling the corporate entity and using it for illegal or improper purposes. Id. For example, the abuse of corporate entities has been recognized in a case where the manager of a small company facing bankruptcy attempted to continue the business by establishing a new company and transferring the old company's assets to the new entity to avoid payment of the old company's debt. Id.; see also Case of Third Party Objection, 59 Minshu 6 (Sup. Ct., July 15, 2005) (holding that an execution debtor could not avoid compulsory execution of its property by abusing the corporate entity through transfer of assets to numerous subsidiaries and affiliated companies).

The second factor named by the Court is applied through a balancing of numerous criteria, including: (i) the shareholder has substantial control of the company; (ii) the corporate assets and the shareholder's individual assets are combined; (iii) "the business activities continue to be unclear"; (iv) confusion over accounting and bookkeeping; and (v) the board meetings and the general shareholders' meetings are not being held. Id.

Although the jurisprudence in Japan in this area is still developing and material available in English is limited, there is no indication that Japanese courts would apply any sort of presumption of shareholder liability when deciding corporate veil piercing issues.

In **Korea**, Article 331 of South Korea's Commercial Code provides for limited liability of shareholders: "The liability of a shareholder shall be limited to the value at which he has taken his own shares." SANGBUP (Commercial Code), Law No. 1000 of 1962. Since the establishment of the Commercial Code in 1962, only two Supreme Court judgments have dealt with the issue of disregarding the corporate entity. Judgment of Sept. 13, 1977, Supreme Court, 74-Da-954 (South Korea) (overruling lower court judgment disregarding the corporate entity where the corporation was found to be the alter ego of the defendant; Supreme Court reasoned that the corporation did not operate illegally and that one individual holding 100% of the corporation's shares did not require dissolution under the relevant Articles of the Commercial Code); Judgment of Nov. 22, 1988, Supreme Court, 87-Daka-1671 (South Korea) (disregarding the corporate entity where there were common officers and directors occupying the

shareholder, to the abuse of the corporate form, or to the looting or stripping of the assets of a subsidiary such that it is rendered insolvent and unable to pay creditors. Indeed, shareholder liability in general is only imposed where the subsidiary itself is unable to pay and that inability to pay is generally because of something done by the shareholder.

Worryingly, this disregard for established corporate law principles has the potential to influence cartel enforcement at a European Member State level also. This raises the stakes significantly for shareholder companies even more, not only in terms of increased exposure to administrative fines in national cartel proceedings and follow-on damages litigation, but it also increases the risk of an uplift in any future competition law fine imposed by the Commission with the coming into force of the revised Fine Guidelines that permit the Commission to uplift fines where the infringer has been subject to previous Article 81 EC infringement decision(s) at the European, and now also the Member State, level.

At first blush, this might seem trivial; who cares about this sort of liability? It is after all “in the family”. But at second blush, it is not “in the family” in many cases, and given the way that private equity firms in Europe and elsewhere buy and sell companies, liability for infringements can drift around for a long time before becoming known and can distort the financial statements of public companies in ways that can be material.

It is the purpose of this brief article to examine the pertinent law in this area and then examine some of the policy implications of the way the Commission treats the law and the companies. In many cases, it is true, the sorts of legal excesses and policy lapses that we point to here may be without consequence, as where a shareholder is held jointly and severally liable with an existing subsidiary and both are entirely solvent. In such circumstances, the Commission’s holding of each of them jointly and severally liable can be thought of as harmless, if not meaningless. Yet in the minority of the cases where a corporation inherits the problem through a company it has acquired, or sells the company and is then left with legacy liability for no particular reason, these failures of law and policy can be considerably more consequential and mischievous.

We conclude with a modest, but in our view realistic, proposal as to how we think the law should in fact be applied to shareholders in order for both the law and the policy to be grounded

same office space); *see also* Sung Bae Kim, *A Comparison of the Doctrine of Piercing the Corporate Veil in the United States and in South Korea*, 3 *Tulsa J. Comp. & Int'l L.* 73, 88 (1995).

When Korean courts have confronted the issue of veil piercing, they have followed many American courts through a balancing of numerous factors, including whether:

- (1) a debtor incorporates in order to evade execution by making investment in kind of his entire property;
- (2) the person who has a contractual duty of nonperformance incorporates in order to act in the name of the corporation;
- (3) the purpose of incorporation is to avoid a covenant not to compete; and
- (4) a new corporation having the same personnel and internal business structure as the old corporation is used to escape punishment from the old corporation's violation of law.

Id. at 87-88. As in the case of Japan, there is no indication that Korean courts would apply any sort of presumption of shareholder liability when deciding the matter of shareholder liability for the acts of a subsidiary.

in a sensible reconciliation of European corporate law and competition law. Simply put, we think that at least one or both of two conditions ought to obtain before shareholder liability is applied. First, it ought to be the case that if the actor, the subsidiary itself, is for some legitimate reason unable to pay the fine -- perhaps because it is insolvent, or is beyond the jurisdictional reach of the European Commission -- only then should the Commission be able to pursue the perpetrator's shareholder. Absent such a condition, the subsidiary/actor ought to be primarily and exclusively liable for its own conduct.

Secondly, we believe that before a shareholder is charged with liability, the shareholder's involvement in the affairs of the subsidiary ought to have been in some way proved plainly to be connected to the unlawful conduct. That is, the acts of the subsidiary ought to be objectively capable of being seen as the acts of the shareholder -- for example, where the shareholder actively participated in or encouraged the subsidiary to engage in this behavior, or had obvious knowledge and turned a blind eye to the infraction -- such that the shareholder can be seen as the infringer to the same extent, more or less, as the subsidiary.

2. THE DEVELOPMENT OF THE PRESUMPTION OF SHAREHOLDER GUILT

In one of the earliest and leading cases on this subject, the 1972 European Court judgment in *ICI*⁸, the court found that although a subsidiary can have legal personality, the Commission's policy is not to exclude the possibility of imputing the subsidiary's conduct to the parent company. This may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out in all material respects, the instruction given to it by the parent company.⁹ This finding does not, however, mean that a 100 percent shareholding, in and of itself, is enough to reach a finding that the parent company is responsible for the subsidiary's infringement. Nor is it necessarily authority for the proposition that in a large industrial corporate group, responsibility always has to be placed with the top holding company. Rather, the Court in *ICI* referred to the *totality of the facts* pointing to *ICI*'s actual use of its power to control its subsidiaries in respect of the actual price increases in question, thus warranting the conclusion that the conduct of the subsidiaries could properly be attributed to the shareholder:

“the applicant ICI Ltd was able to exercise decisive influence over the policy of the subsidiaries as regard selling prices and in fact used this power on the occasion of the

⁸ Case 48/69, *ICI v Commission*, [1972] ECR 619.

⁹ *ICI v Commission*, paras 132-133. Similarly, in *Commercial Solvents*, the ECJ held that the subsidiary of an American firm holding 51 percent of its capital stock followed the policy laid down by the parent and, therefore, the latter was deemed jointly and severally liable for the infringing conduct. Still, according to the ECJ, the parent company “was not abstaining from exercising its power of control over *Instituto* [the subsidiary]”. Cases 6 and 7/73, *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corp v. Commission* [1974] ECR 223, [1974] 1 CMLR 309.

*three price increases in question...It was in fact the applicant undertaking which brought the concerted practice into being in the common market.”*¹⁰

At the time, this was unremarkable. The shareholder was an independent actor, and in regard to the subsidiaries, it was the hand that controlled the puppets. Most jurisdictions with developed legal systems would have reached the same conclusion.

It was not until 1983, more than a decade later, that the ECJ took the first consequential step that led the Commission later to embrace the fully formed “presumption” of decisive influence. The court said the following:

*“As AEG has not disputed that it was in a position to exert a decisive influence on the distribution and pricing policy of its subsidiaries, consideration must still be given to the question whether it actually made use of this power. **However, such a check appears superfluous in the case of TFR which, as a wholly-owned subsidiary of AEG, necessarily follows a policy laid down by the same bodies as, under its statutes, determine AEG's policy.**”*¹¹ (Emphasis added)

The court’s reasoning drew on earlier decisions by the Commission in which a wholly-owned subsidiary was recognized, in principle, necessarily to follow the policy laid down by their parent company and, consequently, was unable to determine autonomously its own course of action in the market. The absence of a subsidiary’s autonomy in determining its own commercial policy is at the heart of the now established presumption of decisive influence by a parent over its subsidiary, and therefore is the key factor between a parent being jointly and severally or not, irrespective of the actual fault, knowledge or participation of the shareholder in the infringement.

A clearer picture of the Commission’s presumption as we now know it emerged in the *Cartonboard* cartel case in 1994.¹² The CFI and the ECJ clarified and apparently settled the issue on the presumption of decisive influence of parent companies over their subsidiaries, as well as clarified the standard of the burden of proof required for a finding of decisive influence. There, the Commission fined Stora for the anti-competitive infringement of two subsidiaries based on its 100 percent ownership of them and a non-rebuttal (or acceptance) of the presumption by Stora during an early stage of the Commission’s proceedings. As the Commission put it:

¹⁰ *ICI v Commission*, paras 137 and 141.

¹¹ Case 107/82 *AEG vs. Commission* (1983) ECR 3151, paragraph 50. In *AEG v. Commission*, however, presented evidences showing that the shareholder had in fact strongly influenced its subsidiaries with respect to the infringement itself dismissed the EC of a further discussion on presumption.

¹² Commission Decision of 13 July 1994, (IV/C/33.833 – *Cartonboard*).

*“Stora accepts that it is responsible for the involvement in the infringement of its subsidiary companies Feldmuhle, Kopparfos and CBC both before and after their acquisition by the group.”*¹³

Stora appealed to the CFI and later to the ECJ arguing that it was not the correct addressee of the decision and denying any explicit or implicit acceptance of liability for its subsidiaries. Stora argued that the relevant case law should be interpreted so as to impose three conditions for finding parent company liability for the unlawful conduct of subsidiaries: (i) a link between the companies as a result of share ownership; (ii) overlapping management of the companies participating in the anti-competitive practices; and (iii) and the absence of autonomy of the subsidiaries because they are members of a centrally managed group of companies, or because their management interlocks with that of the parent company.¹⁴ Stora further argued that the Commission was not entitled to hold a parent company liable for its subsidiary anti-competitive conduct on the sole ground that the subsidiary was wholly-owned by it.

In response, the Commission referred to the CFI’s prior judgment in *AEG v Commission* in support of the proposition that, where a subsidiary is wholly-owned, the Commission is perfectly entitled to address the decision to the parent company. In such circumstances, the Commission argued that the parent company’s control of commercial policy is presumed; consequently, only where a subsidiary is not wholly-owned is it necessary to look for evidence of actual control over the subsidiary by the parent company. The CFI accepted with this reasoning.

On appeal, the ECJ first corrected Stora’s misrepresentation of the CFI judgment as holding that a 100 percent shareholding sufficed in itself for finding the shareholder responsible and then went on to set forth additional factors (over and above the existence of a 100 percent shareholding) that were instrumental in the Commission’s original decision (*Cartonboard*) and the CFI’s judgment, namely that during the administrative procedure Stora, as quoted above, had accepted its responsibility for its subsidiaries, did not dispute that it was in a position to exert decisive influence, and failed to submit any evidence to rebut the presumption that it had in fact done so. The ECJ then made the following vital point:¹⁵

*“...the imputation to the parent company of its subsidiary’s conduct is **always** dependent on a finding that management power was **actually** exercised^[16]... A **100 per cent***

¹³ Commission Decision of 13 July 1994, (IV/C/33.833 – *Cartonboard*), recital 158.

¹⁴ Case T-354/94, *Stora Kopparbergs Bergslags AB v. Commission*, [1998] ECR II-2111, para. 70. See, in particular, *ICI v Commission*, *AEG v Commission* and *BPB Industries and British Gypsum v Commission*, all cited above.

¹⁵ Case C-286/98 P, *Stora Kopparbergs Bergslags AB v Commission*, [2000] ECR.I-9925, para 27.

¹⁶ Citing to that effect the judgments in Case 48/69, *ICI v Commission*, [1972] ECR 619, paras 132 to 141; Joined Cases 32/78 and 36/78 to 82/78, *BMW Belgium and Others v Commission*, [1979] ECR 2435, para 24, and Case C-310/93 P, *British Gypsum v Commission*, [1995] ECR I-865, para 11.

*shareholding in the capital of the subsidiary cannot, in itself, be sufficient to prove the existence of such control by the parent company.*¹⁷ (Emphasis added)

Since that decision, where the most important language is found more in dicta than as part of an essential holding, that language has been honoured by the Commission almost entirely in the breach. But before getting into the unpredictable realities of efforts to rebut the presumption, we want briefly to address two other short topics: the odd inconsistency if not incoherence of the Commission's use of the presumption when dealing with undertakings, and also the Commission's policy grounding for the presumption.

3. THE COMMISSION'S PRESUMPTION OF A SHAREHOLDER'S DECISIVE INFLUENCE EVEN WHERE "UNDERTAKINGS" ARE INVOLVED

In addressing shareholder liability, the Commission actually conflates and confusingly commingles two distinct and contradictory legal propositions. Thus the Commission first generally invokes the proposition that European competition rules apply to "undertakings" (a concept not involving the notion of corporate legal personality under national law; "undertaking" is also not a term defined anywhere in the EC Treaty). As it has developed, the Commission is able to treat as the relevant "undertaking", for the purposes of Article 81, an entire commercial group or individual subgroups, or subsidiary companies. Yet, confusingly, the Commission nonetheless then proceeds to pursue a theory of presumptive participation in the infringement by the parent company through the exercise of "decisive influence" over the subsidiary.

But if the "single undertaking" theory is correct, then it must surely follow that an infringement has been committed by the "undertaking" consisting of all the Group companies; and if that is so, then the ultimate holding company would be the appropriate addressee of the infringement decision and proceedings should be addressed to that company alone. While this might be an unwise policy choice (and we think it would be), still and all in the circumstances there would then be no need for the Commission to find the parent and subsidiary jointly and severally liable since the "undertaking" alleged to have committed the infringement would be the Group taken as a whole. But perhaps because the Commission feels compelled, for reasons of at least the appearance of sound policy, to place fines where there is some actual deterrent effect, as well as a punitive effect, it seems intent on continuing to apply and enforce its presumptive decisive influence approach to establishing the joint and several liability of shareholders and subsidiaries. And when the Commission is not seeking to put the liability for a fine on an "undertaking," it is still normally imposing fines on shareholders, leaving it to other mechanisms to sort of the relative liabilities between shareholder and subsidiary.¹⁸

¹⁷ Case C-286/98 P, *Stora Kopparbergs Berslags AB v Commission*, [2000] ECR I-9925, para 23; *see also* para 28 (the Court pointed out that the CFI had not held that a 100 percent shareholding in itself sufficed for a finding that the parent company was responsible, and noted that the CFI had "... *also relied on the fact that the appellant had not disputed that it was in a position to exert decisive influence on its subsidiary's commercial policy, or produced evidence to support its claim that the subsidiary was autonomous.*")

¹⁸ One possibility is that the Commission may simply want to make it as easy as possible for itself to collect a fine. For example, in *Commercial Solvents*, Cases 6&7/73[1974] E.C.R. 223; [1974] 1 C.M.L.R. 309 the Commission made a US company and an Italian affiliate jointly and severally liable. It might have wanted to collect the fine against a European company rather than risk an enforcement proceeding in the United States.

In any case, once the Commission has chosen, for whatever policy reasons we may find expedient, to pursue shareholders, then it is desirable for the Commission to articulate and defend its policy inclination and then, if the policy is one that is intended to allocate actual responsibility, to undertake a full and informed evaluation of the actual role played by the shareholder parent in the commercial policies of the daughter company and therefore, in the infringing activity. Such evidence is unlikely to be readily available to the Commission in the absence of submissions to this effect by shareholder companies and therefore, it is understandable, and probably not generally unreasonable, that the Commission start with a presumption of such influence over the activities of a subsidiary in the presence of certain key facts. It is likewise probably not unreasonable that the Commission should widen the scope of its interest and consider what if any role was played by other existing or past entities in an undertaking's corporate group; parties involved in an investigation by the Commission will undoubtedly be more than willing to try to provide relevant evidence and information to allow the Commission to make such an evaluation. But what is unreasonable, and we think a poor policy choice, is for the Commission to hide behind a totally mysterious methodology for determining whether the presumption of decisive influence has been overcome or rebutted.

4. THE COMMISSION SEEMS TO HAVE NO COHERENT POLICY THAT SUPPORTS ITS PURSUIT OF SHAREHOLDERS

4.1 Possible Commission Policies

There may be a number of broader policy reasons underpinning the Commission's reasons for and approach to pursuing shareholder companies for their subsidiaries' infringements. Regrettably, the Commission has not shared its policy inclinations, so we are left largely to speculate.

Firstly, finding parent companies jointly and severally liable for the acts of their subsidiaries provides a way for the Commission to shift the onus for supervision and compliance onto shareholder companies. Put another way, where a parent company fails to supervise and uncover ongoing, or prevent future, cartel activities through shareholder-led compliance (and where ongoing infringements are uncovered, to report these activities to the relevant authorities) the Commission might feel that there has been a sort of shareholder negligence through inattention or inaction. Certainly recent speeches and press releases by the Competition Commissioner point somewhat in that direction.¹⁹ But as we have already highlighted above, the rigorous compliance regimes that are needed in large corporate entities or groups should not be the main, or even sole, responsibility of the ultimate parent company, especially where in this century, many operating entities are bought and sold through private equity markets on a daily basis. While it is doubtless true that effective compliance requires the support and endorsement of top management, effective compliance is also an ongoing process that requires a full understanding of the business environment in which each corporate entity operates and that identifies the potential areas of risk. The legal department of the ultimate parent cannot and

¹⁹ Citation to collection of references.

should not be expected itself to monitor this *minutiae* of its subsidiaries' compliance with all applicable rules and regulations. This responsibility should lie with the local management teams who understand best the operation of their business and know where the risks lie. If the Commission's policy objective is to make parent companies responsible for compliance with the hope that it will be more effective, they are looking in the wrong place.

Second, as the Commission continues to increase the level of fines on companies, one sure way of ensuring that undertakings can pay those fines is to make the ultimate parent company, with the deepest pockets, liable in part or in whole for meeting the fine. It is understandable that the Commission wishes to ensure that its fines get paid. But if maximizing revenues is the policy for holding shareholders liable for the conduct of subsidiaries, the Commission risks the integrity and credibility of its competition policies. In addition, there is no reason why the parent company should be seen as nothing more than a bank account for paying for the misdemeanours of its subsidiary companies if and when those same subsidiaries could be perfectly capable themselves of meeting all of their financial liabilities to the Commission. Absent some sound policy reason to the contrary, and one has not yet been offered by the Commission, we would suggest that the Commission should only look to the parent company when the subsidiary actor in the cartel is not able to discharge its liabilities, and even then only if the shareholder is in some meaningful way responsible for either or both of the infringement or the inability of the subsidiary to pay.

The policy of attacking "deep pockets", if that is in fact a policy for the Commission, has implications for private litigation, which the Commission is rather famously and openly trying to foment in Europe.²⁰ Cartel infringements typically lead to follow-on litigation and while the litigation trend in Europe has not reached anything close to the prevalence of follow-on actions in the US, such suits are likely to increase over time. The resources of parent companies to fund the defence of such claims, as well as to pay any resulting damages, no doubt make shareholders attractive targets for private claimants. By bringing parent companies into the scope of liability, potential plaintiffs will feel more reassured that their damages will be paid. Perhaps more vitally, by imposing liability on shareholders, the Commission creates a situation under which claimants in many European jurisdictions need not establish shareholder liability, but instead can rely exclusively on the Commission's finding of liability and simply prove up their damages.²¹ This makes private litigation even more attractive, while at the same time permitting subsidiaries to escape the full consequences of their own actions.

4.2 Possible Countervailing Policies

Whatever the Commission's policy predilections, they should be stated so as to be measured against the injury that they do to the Commission's core competition mission and against countervailing policies, which after due debate, might be found more sensible. For example, it seems almost elementary that sensible competition policy should seek to punish

²⁰ See the Commission's *Green Paper* of 19 December 2005 on this entire topic at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/index_en.html.

²¹ Citations to cases mainly in the United Kingdom and Germany so providing.

those who committed an infringement, while deterring others from doing so. Punishing investors would serve neither purpose, and would not otherwise advance the interests of sound competition policy. In contrast, fining the infringing actor sends the correct message to other actual and would-be cartel members that those who engage in cartels are the ones who will pay the price.

Relatedly, punishing the investor/shareholder could actually encourage the formation of cartels by motivating subsidiary companies to band together in anti-competitive arrangements with some expectation that, if discovered, the Commission would assist them in avoiding liability by foisting it off on their uninvolved corporate or other shareholders.²²

Established principles of economics, capitalism, and corporate law also suggest the wisdom in respecting the enormous benefits and contributions that the limited liability corporation has made to societies worldwide. Investors purchase stock in such vehicles, thereby providing the capital that provides jobs, innovation, production, economic growth, and a stable and growing tax base that can be tapped by national and local governments. As we have mentioned above (at notes 6,7), it is widely accepted that investors should not be held liable for any more than their investment in the stock of a company. This is the essential reason for the existence of, and great respect for, the limited liability company.

Nicholas Butler, past president of Columbia University in New York City, has credited the limited liability corporation as being a major force in the economic development of the world, stating:

*“The limited liability corporation is the single greatest discovery of modern times ... even steam and electricity are far less important than the limited liability corporation and would be reduced to comparative impotence without it.”*²³

For the Commission to impose liability on shareholders in competition law cases without some true cause that clearly connects the shareholder to the wrongdoing, even if it believes itself empowered to do so, would be inconsistent with the national laws of Member States, inconsistent with other national laws developed over decades and centuries, and an unwise policy choice as it would undermine the vital role of the limited liability company in bringing about capital formation and its societal benefits. To place investors at greater risk than their share investment, absent misuse of the corporate form in some obvious way, is to discourage in the long run various kinds of highly desirable investments to the detriment of society in general.

²² Shareholders may or may not have a right of contribution back against subsidiaries, especially former subsidiaries. This of course would be a matter of national law and could vary place by place. For purposes of making a policy decision as to where to place any fine, the Commission cannot assume that there is a mechanism by which shareholders and subsidiaries (especially where not longer affiliated) can obtain a decision on their respective contribution rights.

²³ Mr. Butler’s address is quoted in Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* at 2 (1927).

Traditionally, joint and several liability refers to the notion that a creditor or a court may make *each* of several parties (*i.e.*, debtors, joint tortfeasors, or judgment creditors) responsible for the *entire* amount of a liability. This theory of liability only makes sense where both or all parties at risk of joint and several liability are in some meaningful sense culpable, and: (a) the Commission has some legitimate reason to fear that one single party may be unable to pay the full sum of damages due²⁴; or (b) the extent of the illegal or harmful result of the actors' conduct cannot be assigned to each individual defendant's acts, and the arbiter prefers to leave the parties to sort out their respective contributions between themselves.²⁵

5. CAN A SHAREHOLDER EVER REBUT THE PRESUMPTION OF DECISIVE INFLUENCE?

In most cases where the Commission has imposed liability on the shareholder, the shareholder has been found to be involved in, or aware of, the cartel activities itself²⁶; or the shareholder made no showing at all before the Commission to try to rebut the presumption²⁷; or

²⁴ This is a potential concern noted by the Commission in *Cartonboard*, cited above, paragraph 153 (“*In the first place, there might be difficulties in collecting the fine were a decision to be addressed to Iggesund Paperboard AB.*”); see also paragraph 174 (“*[T]o reduce the risk of avoidance the Commission will also make each of the four Finnish GC producers which at the relevant times were members of Finnboard (Kyro, Tampella, Metsae-Serla and United Paper Mills) jointly and severally responsible with Finnboard for that part of the total fine which is approximately proportionate to its share of Finnboard's cartonboard sales in the Community during the last full calendar year in which the cartel is known to have been in operation,*” as broken down in Art. 3(v) of the Decision). See also KERSE C. AND KHAN N., *EC antitrust procedure*, 5th ed. London: Sweet & Maxwell, 2005, at page 368 (“*There are obvious advantages to the Commission in being able to extract the total fine from one party, leaving it free to seek contribution from the others as best it can. In the event of any default in payment, the Commission need only seek to enforce its decision once, presumably against the one most conveniently situated and/or best able to pay.*”).

²⁵ See Kerse, *supra* at page 368. This condition of course assumes that there is a mechanism for contribution, which is not necessarily always the case.

²⁶ The Commission in *Cartonboard* wrote that: “*In order, however, to avoid the argument (which tends to blur the distinction between a ‘company’ and an ‘undertaking’)* as to whether the parent company of the group ought to be held responsible for the actions of what are said to be autonomous subsidiaries, the Commission has in principle treated the entity named in the membership lists of the PG Paperboard as the appropriate ‘undertaking’ for the purposes of addressing the present proceedings, subject to the following exceptions: (1) where more than one company in a group participated in the infringement; or (2) where there is **express evidence implicating the parent company of the group in the participation of the subsidiary in the cartel**, the proceedings may be addressed to the group (represented by the parent company).” (emphasis added) (Commission Decision of 13 July 1994, *Cartonboard*, [1994] OJ L243/1, para 143). The ECJ subsequently affirmed this principle in 2000 (Case C-297/98, *SCA Holding v. Commission*, [2000] ECR-I-10101). See also the more recent decision in *Koninklijke KPN vs. Commission* in which the CFI confirmed EC decision attributing responsibility on the parent company for the unlawful actions of its subsidiaries based on the fact that the former was **actively implicated in the infringement** by representing the interests of its subsidiary in the cartel meetings. Case T-309/94, *Koninklijke KPN vs. Commission* (1998) ECR II-1007, paragraph 48; see also Case C-248/98 (2000) ECR I-9641, paragraph 73 and EC Decision 03.09.2004 (Case COMP/E-1/38.069 *Copper Plumbing Tubes*), C(2004) 2826, paragraph 545).

²⁷ The fact that parent companies have held themselves as the **sole interlocutor before the EC** has also been used as an *indicia* of decisive influence. This was the case, for instance, in *Stora* (Case T-354/94, *Stora Kopparbergs Bergslags AB v. Commission*, para. 85) and *DaimlerChrysler AG* (Case T-325/01, *DaimlerChrysler AG v Commission*, not yet reported, para. 184). In *Tokai Carbon*, the CFI has even stated in that occasion that assertion

the showing made was wholly insufficient (often because the shareholder was part of the cartel, had admitted responsibility for the subsidiary, or simply could not plausibly deny its truly decisive influence over the business of the subsidiary).

Supposedly, the presumption of liability in the case of a 100 percent shareholder can be rebutted by adducing evidence that the subsidiary autonomously determined its course of action in the market²⁸; that the shareholder did not give instructions to the company about the company's business practices; that the subsidiary decided independently on its own conduct in the market²⁹; or that the shareholder's interests were purely financial³⁰. This is the type of evidence that the Commission, with the approval of the Courts, has properly found to be inconsistent with the exercise by the shareholder of decisive influence and effective control over the commercial policies of the subsidiary. Yet in nearly all of the cases, the Commission find the

made out of time and so must be disregarded as a new and therefore inadmissible plea in law. Joined cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon* case, decision of 15.06.2005, paragraph 62:

²⁸ See, for example, in *Choline Chloride*, the Commission pointed out that a conclusion on the economic unit could be different if Akzo Nobel subsidiaries were able to - and actually did - operate an autonomous commercial policy during the period concerned without actually articulating in any detail what facts could be used to prove or disprove such a finding (Commission Decision of 09.12.04, Case COMP/E-2/37.533, *Choline Chloride*, paragraph 172: "... *It was this economic unit that was responsible for the production and sale of choline chloride in the EEA and which participated in the cartel. This conclusion could only be different if the (direct or indirect) operational subsidiaries of Akzo Nobel N.V. were able to – and actually did – operate an autonomous commercial policy in the period concerned.(...)*").

²⁹ In *Organic Peroxides*, the Commission concluded that Perorsa acted on its own and that neither of its parent companies exercised decisive influence on it individually. Therefore FMC and Laporte were not considered to be responsible for the behavior of the joint venture Perorsa (*Organic Peroxides*, cited above, para. 391 (note 46)). Also, some key facts in the case were: (i) Laporte PLC and FMC were 50-50 joint owners of Spanish company Perorsa; (ii) Laporte was involved in the European cartel from 1992 to 1999; (iii) Perorsa was involved in a Spanish subset of the cartel as a separate participant (and got fined); (iv) FMC was sent a SO but was dropped from the decision (as was Laporte for this aspect of the cartel). Laporte was thus not held responsible for the separate cartel activity of Perorsa in Spain, though of course it was responsible for its own participation in the European cartel.) FMC argued that as a full function JV, Perorsa was responsible for its own behavior. According to FMC, Perorsa's commercial behavior was not affected by its, or indeed Capote's, representation on the Board. With respect to FMC, the Commission stated that "*it did not have enough evidence to prove that FMC was responsible for the illicit activities of Perorsa.*" (*Organic Peroxides*, para 78). The same treatment was applied to Peroxid Chimie (PC), which had been part of the Solvay-Laporte Interlox "Joint Venture". With respect to the pre-1992 part of the infringement, when it was still part of Interlox, PC was alone held liable for the infringement, "*as none (sic) of the parent companies of the Interlox joint venture (Solvay and Laporte) exercised decisive influence on PC*". For the period 1970-1992, PC was part of the "Interlox Group", a JV without legal personality between Solvay and Laporte Industries. Interlox was a sort of "virtual JV" which really just coordinated the activities of Solvay and Laporte in peroxides and perborates and had no real separate existence. Post 1992, PC was 100 percent owned by Laporte (and therefore Laporte was held jointly liable).

³⁰ *Choline Chloride*, cited above, paragraph 172: "...*This is, however, not the case. Akzo Nobel N.V. is not simply an investment vehicle which serves merely to invest capital in companies whose commercial operations it then leaves to those companies, withdrawing capital as soon as it considers that an investment in other companies, possibly not belonging to the Akzo Nobel group, would provide a better return. As Akzo Nobel itself describes the functions of Akzo Nobel N.V., this legal entity serves as "the corporate centre" of the Akzo Nobel group of companies...*" (emphasis added).

shareholder liable, and in the rare case where it does not, it offers little or no guidance on why it has not found the shareholder liable.

A notable and recent example is the Commission's decision in *Raw Tobacco Spain*³¹ in which the Commission decided *against* imposing liability on a number of shareholders. First, the Commission decided not to hold the Universal Corporation Group liable for the infringement committed by its wholly owned subsidiaries, Taes and Deltafina. Having first observed that the conduct of two other members of the cartel should be ascribed to their respective shareholders, the Commission went on to note simply that:

“ ... following the issuing of the Statement of Objections and the hearing of the parties, it has become apparent that the evidence in the file could not warrant a similar conclusion in respect of Universal [Group's] shareholdings in Taes and Deltafina”.

In addition, another shareholder company, Intabex, was found not to be liable for the actions of its subsidiary, Agroexpansión, because there was no evidence of its material involvement in the anti-competitive arrangements in question:

*“In fact, apart from the corporate link between the parents and their subsidiaries, there is no indication in the file of any material involvement of Universal Corporation and Universal Leaf in the facts which are being considered in this Decision. It would therefore not be appropriate to address them a decision in this case. The same conclusion would apply, a fortiori, to Intabex insofar as its 100% shareholding in Agroexpansión was purely financial.”*³²

The Commission further found that:

*“ ... in its response to the Statement of Objections, Intabex has adequately provided that, owing to the purely financial nature of its interest in Agroexpansión, it was not in a position to exert any decisive influence over the subsidiary.”*³³ (emphasis added).

The Commission seems correctly to have considered that, given the absence of express evidence of any material involvement of the parent company in the facts pertinent to its

³¹ Commission Decision of 20 October 2004, *Raw Tobacco Spain*, not yet reported, paragraph 376.

³² *Raw Tobacco Spain*, cited above, paragraph 376. Thus, Universal Corporation, parent company of Deltafina and Taes, was not responsible for its subsidiaries' illegal conduct, even though there were interlocking directorate positions of Taes and Deltafina and of “other firms in the Universal Corporation Group”. Deltafina was a wholly-owned Italian subsidiary of the American Universal Corporation and also a sister company of co-conspirator Taes (a 90% subsidiary of the Universal Corporation Group, and since late 2002 a 100 percent subsidiary of Universal Leaf). Nonetheless, Deltafina alone was responsible for the Universal Corp. group's activities in Europe, as it was the direct purchaser of most of the tobacco by it and by Taes. It alone was the signatory to various related tobacco service contracts. *Id.* at paragraph 29.

³³ *Id.* at paragraph 383.

subsidiaries liability, the corporate link between them was insufficient to warrant a finding that the shareholder should be held liable for the subsidiary's activities. And in the recent *Copper Plumbing Tubes* case, the Commission has also said a little bit about why it let off a shareholder.³⁴

It is regrettable that the Commission rarely provides any truly detailed reasoning on why, and on what evidence, it determines that a shareholder has rebutted the presumption of 'decisive influence' over an infringing subsidiary. It is perhaps indicative of the Commission's increasingly tough stance towards parties trying to rebut the presumption of 'decisive influence', that in a distinct but related investigation into arrangements in the *Italian Raw Tobacco* case, which resulted in an infringement finding and the imposition of fines, the same arguments founded on the parent company's "purely financial" interest fell on deaf ears at the Commission. Rather than seizing the opportunity to clarify the scope of the presumption and specify why it found the existence of decisive influence in only one of these cases - in spite of the apparently similar or identical corporate structures in place - the Commission shied away from more explicit statements that may have created a 'rod for its own back', but would have nevertheless provided some much needed precision and legal certainty for other shareholders.

These cases get at the nature of the showings that are, on the one hand, inadequate to rebut the presumption (waiver; coordination of subsidiaries' actions; actual participation one way or another in the infringement as in most cases) and that are, on the other hand, arguably adequate to rebut it (pure financial interest; no involvement in cartel; not acting as a principal directing agents; not instructing the subsidiary in its business particulars; allowing the subsidiary to operate with autonomy and independently in its market-facing conduct). The trouble is that in the latter cases, the Commission's language is either *dictum* (insofar as it states what a party failed to prove) or not terribly helpful (insofar as it tends to be a short conclusory statement).

What is most striking about the cases is the wholly inadequate delineation of the 'decisive influence' test and how it may be rebutted. The Commission *says* that the presumption applies where companies own 100 percent of the shareholding in the subsidiary, and that this

³⁴ Commission Decision of 30 September 2004, not yet reported. This provides an instructive analogy. SMI, with a less than 100 percent shareholding in three subsidiaries (KME, TMX, and EM), argued that it was merely a financial holding company and that it was neither involved in the operational business of its subsidiaries nor participated in the arrangements described in the Statements of Objections. The Commission accepted, more or less *ipse dixit*, that SMI could not be held liable, especially considering that SMI was neither involved in the cartel or aware of it, nor did it manage the commercial policies of its subsidiaries or give them instructions regarding them.

Similarly, in *Austrian Banks*, another case in which the Commission seems to have applied the "decisive influence" theory (although the decision never expressly uses the term "decisive influence"), GiroCredit was a wholly-owned subsidiary of Bank Austria Aktiengesellschaft and its share management company, AvZ. The Commission concluded in its decision that the documents in the Commission's file did not provide any evidence that GiroCredit's business policy was "*influenced, or indeed determined*", by a parent company" (emphasis added). Analysis of the documents available, minutes of cartel meetings and internal GiroCredit documents, particularly in connection with its internal decision-making, showed clearly, in the Commission's view, that GiroCredit acted independently, on its own responsibility and without instructions in its own interests and in the interests of the savings bank group (Commission decision of 11 June 2002, *Austrian Banks - Lombard Club*, [2004] OJ L56/1, paras 479 to 480).

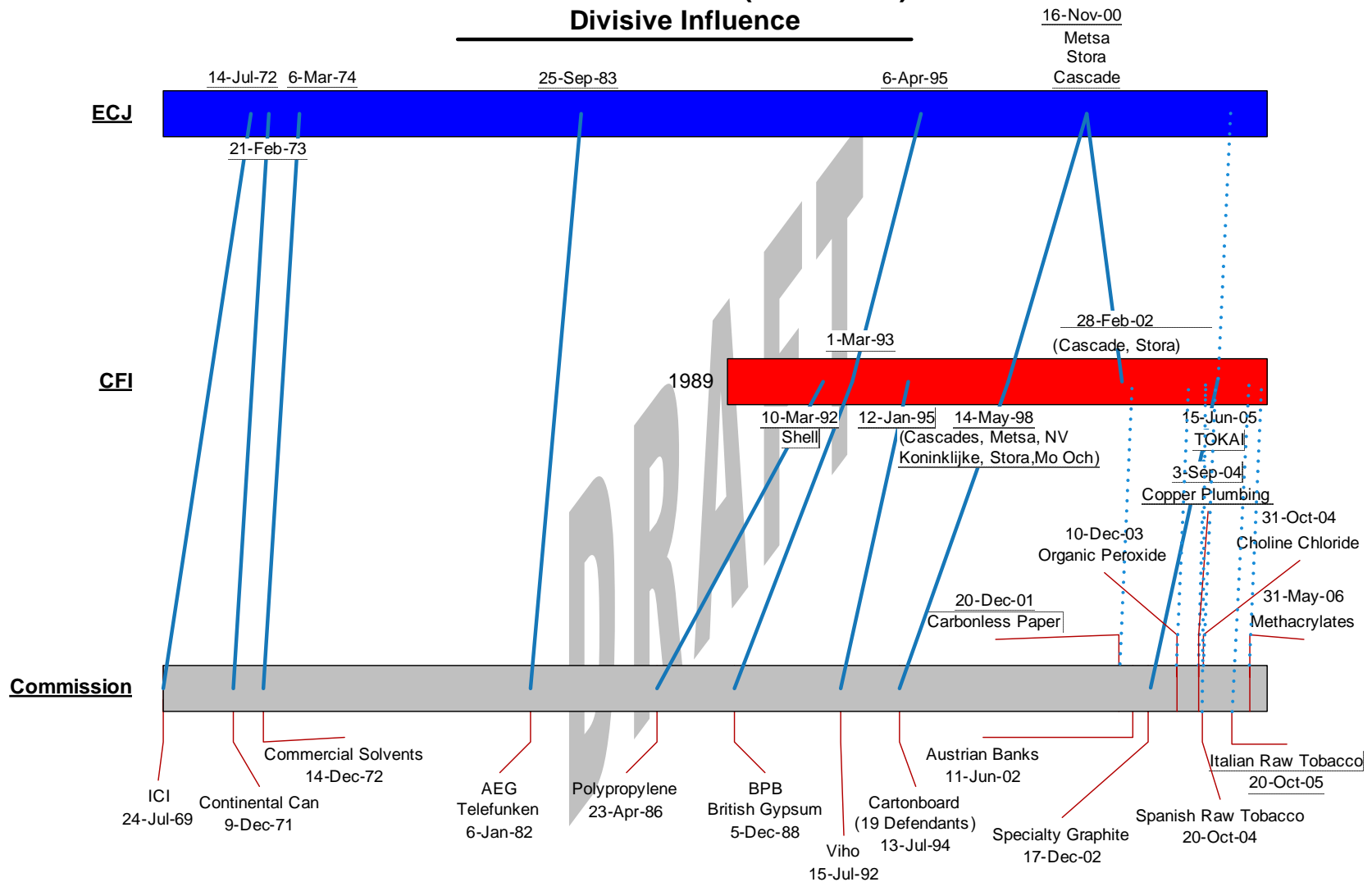
presumption may be rebutted. In reality, most of those cases in which a party has successfully rebutted the presumption have involved parent companies with less than 100 percent shareholding (which precluded the Commission from presuming decisive influence based solely upon a purely structural notion of shareholding). The Commission looked at other factors, such as knowledge or involvement of the parent company in the subsidiary's activities, in support of a finding of joint and several liability. Therefore, when speaking of the liability of parent companies for their wholly-owned subsidiaries, it seems all but impossible to rebut successfully the presumption of decisive influence. In those rare instances where the presumption has been found rebutted, the Commission has failed to provide any helpful indication of the quality and nature of evidence and that was adduced by the relevant party to show the absence of its decisive influence over a subsidiary.

Not content with providing insufficient guidance on its reasoning, the Commission also has apparently applied its test in an inconsistent manner: in the recent Tobacco cases discussed above, in the first case a party was able to rebut the presumption, and in the second case (*Raw Tobacco Italy*) it was not, for reasons wholly unknown and not made public.

In any event, notwithstanding the lack of transparency, there is also no apparent reason for the Commission to distinguish its approach in assessing shareholder liability according to whether the shareholder has 100 percent, or less. The fuller examination of the circumstances of the parent company's involvement in the infringement, its knowledge and participation, or even its willingness to act as sole interlocutor before the Commission, are factors that the Commission appears to be willing and able to take into account for shareholders with less than 100 percent holding, albeit for companies potentially with a very significant shareholding and with the same or similar corporate rights to, for example, appoint the subsidiary's directors or otherwise direct its commercial policies. It is striking that the Commission is unwilling to enter into these same wholly rational and just evaluations when dealing with a parent company holding a full 100 percent shareholding, and as a result the Commission sets the bar very much higher for these parties than those with just majority stakes in the perpetrators.

The Diagram on the following page sets forth the main cases touching importantly upon the whole issue. The table is notable for showing the reality that much of the law and policy is very recent. In addition, many cases are still pending before the Commission and others are on appeal either at the CFI or the ECJ. Thus there is more on all this to be written in the near and medium term.

Case Law Timeline (1969-2006) Divisive Influence





6. WHAT DOES THIS MEAN IN PRACTICE FOR PARENT COMPANIES FACING LIABILITY FOR EXISTING OR PAST SUBSIDIARIES' ACTIONS?

Perhaps the most obvious and immediate consequence of this development in shareholder liability is greater exposure to potentially significant administrative fines. Unlike the system for prosecuting cartels in the United States, the EC procedure is administrative (not criminal) and it does not have the ability to impose criminal fines or custodial sentences on individuals implicated in the cartel arrangements. However, the administrative nature of the European system should not give companies cause for comfort because the Commission continues to impose very significant fines on companies engaging in cartels with effect in Europe, and this trend shows no sign of abating. For some years now the Commission has stated often and very publicly of its priority to crack down on illegal cartels operating in Europe and the Commission is imposing hefty fines to try to get companies to cease such behavior.

The Commission's fining armory has just got been bigger and better, with the introduction of revised Fine Guidelines,³⁵ which will undoubtedly result in notably heavier fines in the future. No decision has yet been taken applying the new Guidelines, but they arguably provide greater certainty to companies about the level of fines they may face. Crucially, the new Guidelines increases the amount of uplift to the basic fine that the Commission may apply where companies are repeat offenders of European competition rules, whether involving a cartel offence or other anticompetitive practice, and including decisions taken by national competition authorities of the Member States.³⁶ The Guidelines also bolster the amount of uplift that may be applied "to ensure that fines have a sufficiently deterrent effect" and to that end the Commission may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates³⁷; naturally, the deterrence uplift has the potential to hit large conglomerate entities or corporate groups.

The administrative fine can in some cases be just the start of the story. Shareholder companies may find themselves embroiled in follow-on litigation concerning two distinct disputes. First, where there is a finding of joint and several liability with a company that is no longer part of the corporate group, the allocation of the fine is no longer an internal accounting exercise, and difficult questions arise as to the amount of the single fine that each company should pay. This has the potential to be highly contentious where the companies have not properly accounted for such eventualities under the terms of the sale agreement.

Second, follow-on damages litigation in Europe is still in relative infancy but is already showing signs of an uptake by private plaintiffs of their rights to sue in national courts. Undertakings cannot afford to underestimate their potential exposure to private competition litigation, and in particular follow-on damages claims following a finding by a competition

³⁵ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ 2006 C210/2 (the "Guidelines").

³⁶ *Id.* para 28.

³⁷ *Id.* para 30.

authority of an infringement. That said, relatively few cases have been brought to date and clearly the risk of litigation is nothing as compared with the almost automatic follow-on litigation that follows a guilty plea in a DOJ investigation. It is nevertheless a potential exposure that companies increasingly will have to face. In addition, infringement decisions are also starting to have a spill-over effect in the US courts, where proceedings have recently been brought based upon a European Commission infringement decision.³⁸

Finally, greater shareholder liability has the potential to extend considerably the potential monitoring, compliance obligations of a head parent company. In the case of conglomerate companies with many dozens or more subsidiary companies (which for all commercial intents and purposes have their own separate legal function and compliance responsibilities), this increases hugely the administrative and legal function of the parent company and in some cases will duplicate that function – group parent companies will have to rethink how they approach group compliance and perhaps reign-in this legal and compliance function. It cannot be disputed that all companies should take their compliance responsibilities most seriously – however, we question how effective a parent-company compliance regime will be where the group company comprises numerous subsidiaries in different industries or markets, and perhaps each requiring differently tailored compliance programs to be installed. We would question whether this is a function best served by central rather than local and better informed individual management.

7. FINAL REMARKS

If the Commission is to exercise its discretion in attributing liability in this way, it should do so reasonably and in accordance with consistent and well-defined policies and principles. It is hard to see that the Commission currently does either. The ‘test’ has been twisted to serve the Commission’s undisclosed ultimate aims to such an extent that it is not in effect a proper legal test at all: indeed, in very few cases has the Commission accepted that a parent company has successfully rebutted the presumption of decisive influence, and even in those cases it has utterly failed to articulate on what facts and reasoning turned its rare findings of no ‘decisive influence’ by a parent company.

Arguably, the reliance on a legal presumption by the Commission is to facilitate what could otherwise be a difficult burden of proof to discharge in finding the shareholder responsible for the subsidiary’s individual conduct in a cartel. However appropriate the presumption used by the Commission, it surely cannot be disputed that a presumption is not an excuse to avoid time-consuming assessment of appropriate facts to analyze whether the parent’s influence over the

³⁸ *Pasian vs. Outokumpu Oyj, et al.*, case no. 2:06-cv-02514, in the U.S. District Court for the Western District of Tennessee based upon the Commission’s infringement decision in *Copper Plumbing Tubes*. The suit, filed on 11 August 2006, alleges that Outokumpu conspired with a group of its rivals to fix prices in the U.S. copper tube market for more than 15 years. This lawsuit stems from the European Commission investigation that found Outokumpu, Wieland, Trefimetaux, Europa Metalli and others participated in an international price-fixing and market allocation conspiracy in the copper tubing industry. While the EC decision (which is being appealed to the European courts) focused only on conduct in Europe, the Tennessee lawsuit targets the effects of the alleged cartel activity within the United States. In July, a class action was also filed in the U.S. District Court in the Northern District of California targeted dozens of copper tubing companies around the world for allegedly coordinating price increases and monitoring the arrangement through market leaders for at least 13 years.

subsidiary's policies was indeed 'decisive'.³⁹ It does not relieve the Commission of its normal burden of proof in connecting the addressee of a decision to the corporate policies giving rise to the infringement found. In discharging this burden, the Commission must have regard to the totality of the facts surrounding the shareholder's actual use of its power to control its subsidiaries in respect of the infringement in question, thus warranting the conclusion that their conduct could, on the facts, be rightfully attributed to the shareholder.⁴⁰ In *ICI v Commission*, the Commission took into account the full circumstances surrounding the parent company's involvement, not just the ownership or theoretical use of shareholder rights.⁴¹

The Commission *says* that it is possible to rebut the presumption, but that absence of any clarity on when, in practice, this occurs leads to a situation where legal certainty is sacrificed in the name of blindly pursuing an overarching policy aim of punishing parent companies for some sort of negligent oversight rather than for any actual involvement or even knowledge of the anticompetitive behavior engaged in. This makes it very difficult to counsel companies on how to present their case to the Commission in trying to rebut a finding of decisive influence.

We challenge the notion that a parent company can somehow be seen to participate in any serious infringement of competition law, and be subsequently fined potentially substantial sums, without any evidence of participation, knowledge or other form of involvement in the infringement. The Commission's stance on shareholder liability in effect incorporates a principle of nearly per se vicarious liability into European competition law. If this is the Commission's intention, then it should at least state as much. This would at least provide greater legal certainty than the current unsatisfactory state of the law, even if one does not agree with imposing liability on parent companies in the absence of actual participation in the cartel.

Beyond all this, we suggest that a sensible rule of law for the EC would be for it to embrace in a general way the principles that animate the law in the Member States and elsewhere. Thus we suggest the following:

1. Where a subsidiary found to have infringed article 81 exists, can be found, and has the ability to pay the fine, it should be required by the Commission to do so. There is no need for joint and several liability to be imposed.
2. If the subsidiary does not exist or cannot be reached by the Commission, the Commission should consider imposing vicarious liability on the shareholder only where:

³⁹ Other cases such as *Shell and BPB Industries Plc and British Gypsum Ltd* have mentioned the presumption in wholly-owned structures but without further discussing it, since there were other factors in the case that contributed to a finding of decisive influence and irrelevancy of a presumption discussion (Case T-11/89, *Shell International Chemical Company v Commission* (1992), ECR II-00757, and Case C-310/93, *BPB Industries Plc and British Gypsum Ltd v Commission*, (1995), ECR I-865).

⁴⁰ *ICI v Commission*, above, at 137 and 141.

⁴¹ *ICI v Commission*, above, at 130-141.

- a. the shareholder truly can be found to have been an active participant in the infringement through its domination and control of the subsidiary in connection with the subsidiaries cartel activities, or
- b. the shareholder is responsible for the insolvency or inability of the subsidiary to pay by virtue of having improperly “looted” the resources of the subsidiary under traditional notions of corporate law.

These are modest proposals but they would change in a material way the manner in which the Commission goes about choosing who to fine, and it would provide the Commission with sound policy reasons for making that choice. Should the Commission approach shareholder liability in this way, it would also bring its own words more into line with its actions and thereby make the entire process more transparent in ways that would be useful to the corporate community and the bar.

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